

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION

MELISSA VILLANUEVA, ON	§	
BEHALF OF THE ESTATE OF ABELINO	§	
GUZMAN, DECEASED, AND ON	§	
BEHALF OF A.G., A MINOR, DESIRAY	§	
DAVIS, AND TRACY GUZMAN	§	
	§	
V.	§	CIVIL ACTION NO.: <u>2:21-cv-48</u>
	§	JURY DEMANDED
ELECTRIC RELIABILITY COUNCIL	§	
OF TEXAS, INC., AMERICAN	§	
ELECTRIC POWER COMPANY, INC.,	§	
AND AEP TEXAS, INC.	§	

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DEFENDANTS AMERICAN ELECTRIC POWER COMPANY, INC. AND  
AEP TEXAS INC.’S NOTICE OF REMOVAL

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TO THE HONORABLE UNITED STATES DISTRICT COURT:

COME NOW American Electric Power Company, Inc. (“AEPC”) and AEP Texas Inc. and respectfully submit this Notice of Removal pursuant to 28 U.S.C. §§ 1332, 1441 and 1446.

**I. BACKGROUND**

1. On February 26, 2021, Plaintiffs sued Defendants Electric Reliability Council of Texas, Inc. (“ERCOT”), AEPC, and AEP Texas Inc. in an Original Petition filed in the 79<sup>th</sup> Judicial District Court of Jim Wells County, Texas, for negligence and gross negligence arising out of the “rolling blackouts” ordered by ERCOT to electric utilities throughout the state of Texas in connection with the

extreme cold weather event that occurred in February 2021. Plaintiffs allege that power to the decedent's home was lost on February 14, 2021, and the home continued to be without power on February 16, 2021, causing the decedent to die as a result of hypothermia (Pltfs' Orig. Pet., p. 7-8).

2. AEPC and AEP Texas Inc. were served with summons and the Original Petition on March 3, 2021. Both filed their Original Answers on March 22, 2021. ERCOT was served on March 4, 2021, and filed its Original Answer on March 23, 2021.

3. This case is removable under federal diversity jurisdiction. *See* 28 U.S.C. §1332. Removal is warranted because Plaintiffs seek damages in excess of the statutory limit and because the served and properly joined defendants are diverse. ERCOT is an improperly joined defendant because Plaintiffs have no possibility of recovery against it.

4. Because AEPC and AEP Texas Inc. were served with the lawsuit on March 3, 2021, this notice of removal is properly filed within the 30-day time period required by 28 U.S.C. §1446(b)(1). Consent from the remaining defendant who has been improperly joined is not required. *See Escalante v. Deere & Co.*, 3 F.Supp.3d 587, 590 (S.D. Tex. 2014) (citing *Rico v. Flores*, 481 F.3d 234, 239 (5th Cir. 2007)).

## **II. BASIS FOR REMOVAL-DIVERSITY OF JURISDICTION**

5. This action is removable under 28 U.S.C. §1332 because the properly served and joined parties are diverse. According to Plaintiffs' Original Petition, Plaintiffs are all Texas residents. (Pltf's Orig. Pet., pg. 1-2).

6. Defendant AEPC is a New York corporation with its principal place of business located in Columbus, Ohio. Defendant AEP Texas Inc. is a Delaware Corporation with its principal place of business in Columbus, Ohio.

7. The citizenship of the remaining defendant, ERCOT, should be disregarded because it has been improperly joined. *See Smallwood v. III. Cent. R.R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004) (en banc) (discussing improper joinder). A party seeking a federal forum can establish improper joinder by demonstrating that there is either “actual fraud in the pleading of jurisdictional facts,” or “no reasonable basis for the district court to predict that the plaintiff might be able to recover against the nondiverse defendant.” *Toney v. State Farm Lloyds*, 661 F.App'x. 287, 290 (5th Cir. 2016) (quoting *Smallwood*, 385 F.3d at 573). Under the second method, improper joinder is established when “there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant.” *Smallwood*, 385 F.3d at 573. To resolve a question of improper joinder, the court may conduct a Rule 12(b)(6)-type analysis.

*Id.* The Rule 12(b)(6) analysis incorporates the federal pleading standard. *Int'l Energy Ventures Mgmt., LLC v. United Energy Group, Ltd.*, 818 F.3d 193, 200 (5th Cir. 2016). Accordingly, “a complaint must have contained enough facts to state a claim to relief that is plausible on its face.” *Id.* at 200. Where a plaintiff has “stated a claim, but has misstated or omitted discrete facts that would determine the propriety of joinder . . . the district court may, in its discretion, pierce the pleadings and conduct a summary inquiry.” *Smallwood*, 385 F.3d at 573.

8. “Jurisdictional facts are determined at the time of removal, not by subsequent events.” *Flagg v. Stryker Corp.*, 819 F.3d 132, 137 (5th Cir. 2016). Thus, the possibility of recovery against a non-diverse defendant is examined at the time of removal. *See id.* “This inquiry must be made regardless of whether the court examine the plaintiff’s chance of surviving a Rule 12(b)(6) challenge, or instead, conducts a summary inquiry by piercing the pleadings.” *Id.* If the court determines that a party was improperly joined, “then the court may disregard the citizenship of that defendant, dismiss the non-diverse defendant from the case, and exercise subject matter jurisdiction over the remaining diverse defendant.” *Id.* at 136.

9. Plaintiffs have no possibility of recovery against ERCOT because it is entitled to sovereign immunity.

10. Plaintiffs allege that ERCOT is liable for ordering rolling blackouts and depriving the decedent of power and heat. (Pltfs’ Orig. Pet., pg. 5).

11. Plaintiffs further allege that ERCOT failed in its duty to estimate and plan the amount of power that would be required in the Winter 2021 season. Further, Plaintiff alleges that ERCOT violated various provisions of 16 Tex. Admin. Code §25.52 concerning preventing interruptions of service and managing emergencies resulting therefrom. (Pltfs' Orig. Pet., pg. 8.).

12. Pursuant to Tex. Util. Code §39.151, ERCOT was certified by the Texas Public Utility Commission (PUC) as the independent system operator (ISO) to, among other functions, ensure the reliability and adequacy of the regional electrical network. ERCOT is a necessary component of the legislature's electric utility industry regulatory scheme. *See id.* §39.151(a). Rules adopted by the PUC require ERCOT to administer a "mechanism" to provide for resource adequacy in an energy-only market, which mechanism is intended to encourage market participants to build and maintain a mix of resources that sustain adequate supply of electric service in the ERCOT power region. *See* 16 Tex. Admin. Code §25.505(a) & (g) (requiring ERCOT to administer "scarcity pricing mechanism").

13. Because: (a) ERCOT exercises power delegated to it by an administrative agency (the PUC) pursuant to legislation; (b) its power includes rule-making authority that is binding on market participants; and (c) it is subject to broad oversight by the PUC, which can decertify it, the only Texas appellate court to consider and determine its status has concluded that ERCOT is entitled to sovereign

immunity from private damage suits in connection with the discharge of its regulatory responsibilities. *See Electric Reliability Council of Texas, Inc. v. Panda Power Generation Infrastructure Fund, LLC*, 552 S.W.3d 297, 319 (Tex. App.-Dallas 2018, pet. dism'd w.o.j.). Thus, Plaintiffs have no reasonable possibility of recovery from ERCOT. As a result, ERCOT is improperly joined, and its citizenship should be disregarded for purposes of diversity jurisdiction.

### **III. AMOUNT IN CONTROVERSY AND VENUE**

14. Plaintiffs have pled damages in excess of the statutory minimum for purposes of diversity jurisdiction. 28 U.S.C. §§ 1332(a) and 1446(c)(2)(A)(ii). (Pltf's Orig. Pet., pg. 3).

15. Venue for this removal is proper under 28 U.S.C. § 1446(a) because this Court is the United States District Court for the district and division corresponding to Jim Wells County, Texas, the place where the state court action is pending.

### **IV. JURY DEMAND**

16. AEPC and AEP Texas Inc. assert their rights under the Seventh Amendment to the U.S. Constitution and demand, in accordance with Federal Rule of Civil Procedure 38, a trial by jury on all issues.

## V. DOCUMENTS FROM THE REMOVED ACTION

17. Pursuant to Local Rule 81, the following documents are attached to this Notice of Removal.

Exhibit 1: All executed process in the case;

Exhibit 2: Pleadings asserting causes of action and all answer to such pleadings.

Exhibit 3: The docket sheet;

Exhibit 4: An index of matters being filed; and

Exhibit 5: A list of all counsel of record, including addresses, telephone numbers, and parties represented.

18. AEPC and AEP Texas Inc. have served all parties with a copy of this Notice of Removal and forwarded it for filing with the Clerk for the 79<sup>th</sup> Judicial District Court of Jim Wells County, Texas, Cause No. 21-02-60953-CV; *Melissa Villanueva, on Behalf of the Estate of Abelino Guzman, Deceased, and on Behalf of A.G., A Minor, Desiray Davis, and Tracy Guzman v. Electric Reliability Council of Texas, Inc., American Electric Power Company, Inc. and AEP Texas Inc.*; in the 79<sup>th</sup> Judicial District of Jim Wells County, Texas, in accordance with 28 U.S.C. § 1446(d).

## VI. CONCLUSION

19. In accordance with 28 U.S.C. § 1441, AEP and AEP Texas Inc. may properly remove the state court action to this Court because: (1) it is a civil action pending within the jurisdiction of the United States District Court for the Southern District of Texas, Corpus Christi Division; (2) the served and properly joined parties are from different states; and (3) exclusive of interests and costs, the amount in controversy exceeds \$75,000.00.

Respectfully submitted,

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**ATTORNEYS FOR DEFENDANTS  
AMERICAN ELECTRIC POWER  
COMPANY, INC. AND  
AEP TEXAS INC.**

**CERTIFICATE OF SERVICE**

I certify that on the 24th day of March, 2021, a copy of **Defendants AEPC and AEP Texas Inc.'s Notice of Removal** was electronically filed using the CM/ECF system, which will automatically serve a Notice of Filing on the following attorneys:

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*/s/ William Johnson*  
\_\_\_\_\_  
William Johnson

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

### I. (a) PLAINTIFFS

**Melissa Villanueva, On Behalf of the Estate of Abelino Guzman Deceased and on Behalf of A G. A Minor**  
**(b) County of Residence of First Listed Plaintiff Jim Wells**  
(EXCEPT IN U.S. PLAINTIFF CASES)

**(c) Attorneys (Firm Name, Address, and Telephone Number)**

See attachment to Civil Cover Sheet

### DEFENDANTS

**Electric Reliability Council of Texas, Inc., American Electric Power Company, Inc. and AFP Texas, Inc.**  
**County of Residence of First Listed Defendant Jim Wells**  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

See attachment to Civil Cover Sheet

### II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

<input type="checkbox"/> 1 U.S. Government Plaintiff	<input type="checkbox"/> 3 Federal Question <i>(U.S. Government Not a Party)</i>
<input type="checkbox"/> 2 U.S. Government Defendant	<input checked="" type="checkbox"/> 4 Diversity <i>(Indicate Citizenship of Parties in Item III)</i>

### III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input checked="" type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input checked="" type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input checked="" type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

### IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance	<b>PERSONAL INJURY</b>	<b>PERSONAL INJURY</b>	<b>PROPERTY RIGHTS</b>	<input type="checkbox"/> 375 False Claims Act
<input type="checkbox"/> 120 Marine	310 Airplane	365 Personal Injury - Product Liability	422 Appeal 28 USC 158	<input type="checkbox"/> 376 Qui Tam (31 USC 3729(a))
<input type="checkbox"/> 130 Miller Act	315 Airplane Product Liability	367 Health Care/ Pharmaceutical Personal Injury Product Liability	423 Withdrawal 28 USC 157	<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 140 Negotiable Instrument	320 Assault, Libel & Slander	368 Asbestos Personal Injury Product Liability	<b>SOCIAL SECURITY</b>	410 Antitrust
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	330 Federal Employers' Liability	370 Other Fraud	820 Copyrights	430 Banks and Banking
<input type="checkbox"/> 151 Medicare Act	340 Marine	371 Truth in Lending	830 Patent	450 Commerce
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans)	345 Marine Product Liability	380 Other Personal Property Damage	835 Patent - Abbreviated New Drug Application	460 Deportation
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	350 Motor Vehicle	385 Property Damage Product Liability	840 Trademark	470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 160 Stockholders' Suits	355 Motor Vehicle Product Liability	<b>LABOR</b>	880 Defend Trade Secrets Act of 2016	480 Consumer Credit (15 USC 1681 or 1692)
<input type="checkbox"/> 190 Other Contract	360 Other Personal Injury	710 Fair Labor Standards Act	<b>FEDERAL TAX SUITS</b>	485 Telephone Consumer Protection Act
<input type="checkbox"/> 195 Contract Product Liability	362 Personal Injury - Medical Malpractice	720 Labor/Management Relations	870 Taxes (U.S. Plaintiff or Defendant)	490 Cable/Sat TV
<input type="checkbox"/> 196 Franchise		740 Railway Labor Act	871 IRS—Third Party	850 Securities/Commodities/ Exchange
<b>REAL PROPERTY</b>	<b>CIVIL RIGHTS</b>	751 Family and Medical Leave Act	26 USC 7609	890 Other Statutory Actions
<input type="checkbox"/> 210 Land Condemnation	440 Other Civil Rights	790 Other Labor Litigation		891 Agricultural Acts
<input type="checkbox"/> 220 Foreclosure	441 Voting	791 Employee Retirement Income Security Act		893 Environmental Matters
<input type="checkbox"/> 230 Rent Lease & Ejectment	442 Employment			895 Freedom of Information Act
<input type="checkbox"/> 240 Torts to Land	443 Housing/ Accommodations			896 Arbitration
<input type="checkbox"/> 245 Tort Product Liability	445 Amer. w/Disabilities - Employment	<b>IMMIGRATION</b>		899 Administrative Procedure Act/Review or Appeal of Agency Decision
<input type="checkbox"/> 290 All Other Real Property	446 Amer. w/Disabilities - Other	462 Naturalization Application		950 Constitutionality of State Statutes
	448 Education	465 Other Immigration Actions		

### V. ORIGIN (Place an "X" in One Box Only)

<input type="checkbox"/> 1 Original Proceeding	<input checked="" type="checkbox"/> 2 Removed from State Court	<input type="checkbox"/> 3 Remanded from Appellate Court	<input type="checkbox"/> 4 Reinstated or Reopened	<input type="checkbox"/> 5 Transferred from Another District (specify) _____	<input type="checkbox"/> 6 Multidistrict Litigation - Transfer	<input type="checkbox"/> 8 Multidistrict Litigation - Direct File
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Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

28 U.S.C. Section 1332, 1441 and 1446

Brief description of cause:

Negligence

### VI. CAUSE OF ACTION

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND:  Yes  No

### VII. REQUESTED IN COMPLAINT:

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

3/24/2021

/s/ William P. Johnson

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION

MELISSA VILLANUEVA, ON	§	
BEHALF OF THE ESTATE OF ABELINO	§	
GUZMAN, DECEASED, AND ON	§	
BEHALF OF A.G., A MINOR, DESIRAY	§	
DAVIS, AND TRACY GUZMAN	§	
	§	
V.	§	CIVIL ACTION NO.: _____
	§	JURY DEMANDED
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OF TEXAS, INC., AMERICAN	§	
ELECTRIC POWER COMPANY, INC.,	§	
AND AEP TEXAS, INC.	§	

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**ATTACHMENT TO CIVIL COVER SHEET**

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